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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on January 9, 1960.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 25–29) is not yet reported.

JURISDICTION

The judgment of the court of appeals is included in its opinion filed on January 9, 1960 (Appendix, *infra*, p. 29). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Douglas on April 6, 1960, to and including April 11, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Rule 71A(h) of the Federal Rules of Civil Procedure provides that any party to a federal condemnation proceeding may, upon demand, have a jury trial of the issue of just compensation. It further provides that the court, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice," may order that the issue of just compensation be determined by a commission of three persons appointed by it. The following questions are presented:

1. Whether a federal district judge abused his discretion by denying the demands of the government and many landowners for jury trial and, *sua sponte*, referring to commissioners, substantially simultaneously and on the basis of virtually the same findings, 21 separate condemnation cases involving 300 parcels of land for four different and widely separated federal projects, which cases constituted almost all of the pending condemnation proceedings assigned to him.

2. Whether Rule 71A(h) empowers a court to refer to commissioners issues other than the amount of just compensation payable by the United States.

RULE INVOLVED

Rule 71A(h), Federal Rules of Civil Procedure, provides in pertinent part:

> *Trial.* If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially con-

stituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

This petition seeks review of a judgment of the court of appeals denying a writ of mandamus by which the United States sought to require respondent, the Chief Judge of the United States District Court for the Southern District of California, to vacate a number of orders by which he referred pending federal condemnation cases to commissioners.

The orders, entered by respondent *sua sponte*, denied requests by the government and by a number of the landowners for jury trials, and referred to commissioners, appointed under Rule 71A(h), 21 separate pending condemnation cases involving 300 parcels of land for four different and widely separated federal projects in the Southern District of

California.[1] The cases referred constituted substantially all of the pending condemnation proceedings assigned to respondent.

The first order (filed May 7, 1959), involving three cases in the Lemoore Naval Air Station project (P. 1–6),[2] is typical. After briefly describing the three cases, it states (P. 1–2):

> The property involved in all said cases is being condemned for a Naval Air Base. It is in the vicinity of Lemoore, California. The total acreage involved in the three cases is 30,400.032 acres of land, more or less. It is in an area largely devoted to agricultural uses and purposes and related activities, and land devoted to similar uses is generally similar in character in that area. The kind or type of property rights in such land, claiming just compensation, are or may be of varied nature and the issues will be complicated. While many of the parcels in case No. 1836–ND have been disposed of by stipulated judgments for just compensation, there remain open and unadjudicated at least 138 parcels in that case, many of which have been sub-divided into subparcels according to the holders of the various kinds of rights claimed, or which may be claimed, to be outstanding against the interest

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[1] The cases were filed between August 1, 1956 and August 3, 1959. The orders were entered between May and August, 1959.

[2] "P." refers to the appendices to the government's "Petition for Writ of Mandamus or Other Extraordinary Relief" in the court of appeals. Respondent filed no response thereto (but see fn. 4, *infra*). Certain of the condemnees participated in the court of appeals proceedings in support of respondent's reference orders.

> of the fee owners on the date of taking. One parcel is open in case No. 1902–ND and 17 are open in case No. 1904–ND.
>
> It is impractical, if not impossible, to try all of the remaining parcels in said cases and various interests and estates taken, before one jury, thus necessitating different trials before different juries, either for different parcels, or for like parcels if consolidated, if trial of each parcel is had by jury.

The order then discusses the number of pending condemnation cases in the District and the length of past jury trials in such cases (P. 2–3). It concludes (P. 3):

> It is impossible to estimate either the number of separate trials or the number of days which would be required in jury trials if all the separate parcels in these cases were tried before a jury, or the time when such trials could be had, because of the very heavy docket, not only in condemnation but in all the other civil and criminal cases pending in the Southern District of California, and the number being filed from day to day. It would be a denial of justice to compel those whose properties are taken in the within condemnation proceedings to await trial by jury of each tract or parcel involved in these cases.
>
> The appointment of commissioners in these condemnation cases would result in more uniformity of awards for like property, estates and interests than could be expected if each parcel were tried by jury.

"[B]ecause of the foregoing facts," "and to prevent a denial of justice resulting from delays," it

"appear[ed] to the Court" that "it would be in the interests of justice" that the "issue of just compensation" should be determined by three commissioners, whom it designated (P. 3–5). The order directs the commission (P. 4) to

> * * * file a report or reports, setting forth their conclusions as to the just compensation of the property condemned, making a separate award of just compensation and valuation in the premises with respect to each separate parcel involved, and the person or persons or entity entitled to receive such award or such portions thereof as each may be entitled to receive. If several parcels are in one ownership, and there is no objection by the parties, a single award may be made for such several parcels, without designating the value attributed to each parcel.

Compensation of the commission was fixed at $85.00 a day for the chairman and $75.00 for each of the other two members, and the court reserved the right to make "other and additional allowances for compensation, upon proper showing and notice" (P. 5). Attached to the order were instructions "to guide the Commission in the determination of just compensation," and the commissioners were informed that they "may from time to time request instructions of the Court" (*ibid.*).

On May 12, 1959, the court entered two orders which, respectively, referred to commissioners one case in the Success Dam and Reservoir Project (P. 8–12) and four cases in the Terminus Dam and Reservoir Project (P. 16–21). On May 20, 1959, it

entered an order referring nine cases in the fourth project, the Casitas Dam and Reservoir (P. 23–31). Each of these three orders made the same findings as in the *Lemoore* order, *supra*, as the basis for the references.

On June 1, 1959, the court referred to commissioners another case, filed on May 1, 1959, (P. 12–14), and on August 3 it entered three orders referring three additional cases filed in July (P. 6–8, 14–16, 21–23). Each of these four additional orders incorporated by reference "all of the facts and things" set forth in the May orders, and stated that "For the foregoing reasons, and good cause appearing therefor," the demand for jury trial was denied and the case was referred to commissioners, who by reference were given the same powers as previously conferred by the May orders (P. 7, 13–14, 15–16, 22–23).

On August 25, 1959, the United States filed a motion to vacate the orders of reference (P. 31–33). Attached thereto were four lengthy affidavits (P. 33–78) which set forth the facts with respect to each of the 21 cases that had been referred (P. 39–78), and presented statistics about the number of pending condemnation cases in the District and the estimated time that would be required if the referred cases were tried by jury (P. 33–39). Two of the landowners joined in the government's motion (P. 78–81), but 19 landowners (including some who had previously demanded jury trials) opposed it, and filed counter-affidavits (P. 81–139).

The government's affidavits stated that the parcels acquired for all four projects are, for the most part,

similar in size, adaptability, character and location to other property in the vicinity of the projects; that in the area of each of the projects there are many comparable sales for appraisal purposes; and that the projects are unrelated except that they all involved condemnation proceedings pending before respondent at the time of the orders of reference (P. 39, 45, 47–48, 59, 70). The affidavits also set forth the following facts with respect to the projects:

1. The Lemoore cases involve land in the San Joaquin or Central Valley approximately 40 miles, or one hour's drive, from Fresno, where the district court sits. The area is characterized by relatively large agricultural holdings devoted exclusively to the farming of irrigated crops. Many of the parcels, except for irrigation facilities, are unimproved or carry improvements which do not appreciably enhance their value (P. 39–46).

2. The Success Dam lies across the Tule River, about 72 miles, or a one hour and 45 minutes' drive, from Fresno. The area is a farming community and the lands involved in the project are devoted to cattle raising, citrus groves and other farming operations (P. 46–57).

3. The Terminus Dam and Reservoir Project is in Tulare County in the eastern portion of the central San Joaquin Valley, approximately five miles downstream from the town of Three Rivers and 62 miles southeast of Fresno. The driving time to Fresno is approximately one hour and 15 minutes. The general area has a rural agricultural economy including beef

cattle, citrus orchards and other irrigated crops (P. 57–68).

4. The Casitas Dam and Reservoir cases involve land along the Santa Ana Creek, a tributary of the Ventura River (except for one parcel on the Ventura River itself). The project is approximately 10 miles inland and northwesterly of the City of Ventura. As in the other cases, the area of the Santa Ana Valley is for the most part devoted to cattle ranches and varied agricultural uses, such as feed crops and citrus fruits, although there are a number of modest homesites and small community developments in the area. The site is approximately 65 miles, or a one hour and 15 minutes' drive, from Los Angeles, where the district court sits (P. 68–78).

On October 1, 1959, the district court denied the government's motion, but amended the paragraph in its prior orders setting forth the duties of the commissioners (*supra*, p. 6) to provide that they should make a

> separate award of just compensation and valuation in the premises with respect to each separate parcel, interest, ownership, or claim involved, and the person, or persons, or entity claiming to be entitled to receive such award or such portions thereof as each may claim to be entitled to receive. * * * [P. 140].[3]

[3] The court also denied the government's request (see P. 33) for a stay of the proceedings before the commissions, pending appellate review (P. 141).

We are advised that only one report covering a contested tract has been filed by the commissions.

The United States filed its motion in the court of appeals for leave to file the petition for mandamus on December 11, 1959, leave was granted on December 14, 1959, and the matter was argued before the court of appeals on January 5, 1960 (R. 146–150). Respondent filed no response to the petition.[4] Four days later the court filed a *per curiam* opinion denying the writ. The court recognized that if respondent's orders of reference "wrongfully" deprived the United States "of jury trials upon the issue of just compensation," the writ should issue (App., *infra*, p. 27), and it further held (*ibid.*) that a "condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule." The court stated (*id.*, pp. 27–29), however, that in seeking an extraordinary writ the United States had a "heavy" burden of showing "clear abuse of discretion"; that the orders of reference "clearly demonstrate" that respondent had other considerations than court congestion "in mind"; that these were valid bases for a reference; and that the United States had "failed to meet" its burden "to make a clear showing" that the various factors relied upon by respondent in making the references "were not involved in these cases."

[4] At the argument, counsel for one of the landowners exhibited to the court what he described as a copy of a letter written by respondent to the court. This letter was not filed in the case, and was not served upon the United States. An Assistant United States Attorney advises that he hastily leafed through the pages of what apparently was a copy of the same letter that was shown to him by one of the commissioners appointed by respondent. He did not recollect the contents of the letter except that it dealt with these proceedings.

REASONS FOR GRANTING THE WRIT

1. This case—and the related case of *United States* v. *Cunningham*, from the Fourth Circuit, in which a petition for a writ of certiorari is being filed simultaneously—present important issues of judicial administration relating to the use of commissioners for determining just compensation in federal condemnation proceedings. In the instant case respondent, the Chief Judge of the District, referred to commissioners substantially his entire docket of pending condemnation cases—21 separate cases involving 300 parcels of land in four separate federal projects. The orders of reference all make the same findings and, as we show *infra* (pp. 17–19), similar findings could be made in most federal eminent domain cases involving the condemnation of substantial tracts of improved land in non-urban areas. As we show (*infra*, pp. 13–16), the intent of Rule 71A(h) is that, when jury trial is demanded in federal condemnation cases, it is ordinarily to be granted; and that a reference to commissioners is to be made only in unusual and extraordinary circumstances relating to the particular land involved. If, however, blanket references may validly be made upon the basis of the factors here invoked, we submit that in many districts trial by commission will become the rule, and trial by jury the exception—a result contrary to that intended by the Rule.[5]

[5] In two recent cases in which courts of appeals upheld orders of reference, the dissenting judges warned against this very danger. In *United States* v. *Wallace*, 201 F. 2d 65 (C.A. 10), Judge Pickett pointed out (p. 68) that "we are laying the

Indeed, such an alarming trend is already discernible. As of December 31, 1959, there were five districts in which *all* pending federal condemnation cases, totalling 1782 tracts, had been referred to commissions. These districts, and the number of tracts referred, are as follows:[6]

W.D. Pa.	299
E.D. S. Carolina	63
E.D. Texas	823
W.D. Texas	554
W.D. Va.	43

In addition, as of that date there had been referred to commissioners (the percentages that follow being approximate) 95% of the 255 pending tracts in the Western District of South Carolina, 90% of the 1108 tracts pending in the District of Kansas, 90% of the 750 tracts pending in the Eastern and Western Districts of Louisiana, 80% of the 659 tracts pending in the District of South Dakota, and 75% of the tracts pending in each of 11 other districts (M.D. Ga.; N.D. and S.D., Iowa; D. Neb.; N.D., E.D., S.D. and W.D., N.Y.; E.D. and W.D., N.C.; and E.D. Va.)—the references in the latter districts constituting approximately 1525 tracts of the 2634 tracts there pending.

Such an extensive use of commissioners in so many important districts strongly suggests that many fed-

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foundation for the establishment of the right of reference as the rule, not the exception." In *United States* v. *Waymire*, 202 F. 2d 550 (C.A. 10), Judge Huxman stated (p. 555): "Unless we take care, trial by jury will become the exception and trial by commission the rule in condemnation proceedings, contrary to the spirit and intent of the rule."

[6] The data showing the number of references in federal condemnation cases are derived from the records of the Department of Justice.

eral judges are now referring all, or most, federal condemnation cases that come before them as a routine matter.[7] It is hard to believe that such a high percentage of cases in so many districts—100% in five districts, 95% in one, 90% in three, 80% in one, and 75% in eleven—all present such extraordinary circumstances as to justify overruling the parties' demands for jury trial.[8] If the instant decision, which probably represents the largest number of cases referred as a single group, remains unreviewed, it threatens further to increase this tendency toward routine referrals. It is therefore particularly important to the future development of the law in this important area that this Court enunciate the principles governing the use of commissions in federal condemnation proceedings.

2. The courts of appeals repeatedly have recognized that, when a jury trial is demanded in a federal condemnation case, Rule 71A(h) requires that it will

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[7] See, for example, the following colloquy in the District Court for the Southern District of Georgia on June 12, 1958, during an argument on a motion to confirm a commissioners' report (*United States* v. *28.67 Acres of Land*, Civil Action No. 735, Tract D-414-E, Transcript, Vol. IV, p. 13):

"Mr. Lewis [Assistant United States Attorney]: I would like to point out this, sir, that the last case heard by a jury in this District was the Gibson case in January, 1954.

"The Court: Well, that is going to be the last one, too, as far as I am concerned."

[8] Under Rule 71A(h), the trial of the issue of just compensation "shall * * * be by the court" unless "any party" files a timely demand for jury trial, in which case he "may have a trial by jury of the issue of just compensation * * * unless the court * * * orders that * * * the issue of compensation shall be determined by a commission * * *."

ordinarily be granted, except where there are extraordinary and unusual circumstances in the particular case that make it appropriate "in the interest of justice" that the issue of just compensation be determined by a commission. Thus, in *United States* v. *Theimer*, 199 F. 2d 501, 503 (C.A. 10), the court, in reversing an order of reference, pointed out that "[t]hroughout all" the lengthy studies that had been made over the years by various groups of the proper procedures for federal condemnation cases (which studies resulted in Rule 71A(h)), there "runs the thought that litigants should have the right of trial by jury of the issue of value except only in extraordinary and exceptional cases and that the commissioner provision of the Rule should be employed only in exceptional cases where because of peculiar circumstances trial by jury was inadvisable." On the basis of this history, the court ruled (pp. 503–504) that "the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in the case * * * the interest of justice warrants the submission of question of value and compensation to a commission." The court held (p. 504) that the ground upon which the reference was made—the wish "to remove all obstacles that cause delay and bring this action to a conclusion"—did not "constitute such extraordinary circumstances as to warrant the trial court in invoking the extraordinary provisions of the Rule." See, also, the subsequent decisions of that

court in *United States* v. *Wallace*, 201 F. 2d 65, and *United States* v. *Waymire*, 202 F. 2d 550.

Similarly, in *United States* v. *Buhler*, 254 F. 2d 876, 880 (C.A. 5), the court stated that "[t]o justify denial of a timely demand for jury trial, it is essential that the exercise of the court's discretion be based upon some exceptional reasons in the interest of justice * * *." See, also, *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C.A. 2), where Chief Judge Clark pointed out that "Both the language and the history of F.R. 71A(h) amply demonstrate that trial to the court is to be the usual method of settling values in Government condemnation, subject to a right in either party to make timely claim for a jury, and that *reference to commissioners is to be an exception for special situations*" (emphasis added). Thus, the "other reasons in the interest of justice," which Rule 71A(h) authorizes as a basis for a reference, must, like the preceding grounds of "character, location, or quantity of the property to be condemned," relate to the exceptional circumstances involving the particular "property to be condemned."

This settled view of the courts of appeals that Rule 71A(h) permits the district court to reject a demand for jury trial only in exceptional circumstances is supported by a report of the Judicial Conference of the United States made shortly after Rule 71A was promulgated on April 30, 1951 (341 U.S. 962). In recommending against enactment of a proposed bill (S. 1958, 82d Cong.) that would have guaranteed any party to a federal district court condemnation action

the right to trial by jury "except where a tribunal has been specially constituted by an Act of Congress governing the case for the determination of that issue," the Judicial Conference stated that it construed Rule 71A(h) "as prescribing trial by jury as the usual and customary procedure to be followed, if demanded, in fixing the value of property taken in condemnation proceedings, and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require." H. Doc. No. 490, 82d Cong., 2d Sess., pp. 5–6.

3. We submit that the grounds upon which the district court here based its blanket reference of 21 pending cases, involving 300 parcels, fall far short of the kind of "extraordinary circumstances" that, under the Rule, justify the denial of a demand for jury trial.

a. In upholding the references, the court of appeals correctly held (App., *infra*, p. 27) that "[a] condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule." See *infra*, pp. 19–23. The court stated, however, that the district court (App., *infra*, p. 28) "gave consideration" to the following additional factors which, it held, sanctioned the references:

> * * * (1) the nature of the property, its varied terrain and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensation was claimed; (3) the complexity of the issues involved; (4) the

improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each case were tried by a jury.

In none of the cases, however, was the reference based on "the facts as they appear in the [particular] case" (*United States* v. *Theimer, supra*). The same findings were made in the 21 cases, involving land in four different and widely separated federal projects. The lack of any proper exercise of judicial discretion in making these blanket references is further shown by the fact that, after the first group of cases had been referred in May, the court automatically referred cases subsequently filed in the same projects, without making any independent findings or analysis, but solely on the basis of, and incorporating by reference, the findings previously made.

Moreover, the five reasons given by the court of appeals do not justify the references. The invalidity of the third reason—the alleged complexity of the issues—is fully discussed in our *Cunningham* petition (pp. 11–14), and we shall not repeat that discussion here. Both the first and fifth reasons—the nature of the property and the probability that use of commissions instead of juries would result in more uniformity of awards—would justify blanket references for virtually every non-urban federal project of substantial size. As the district court's findings show, there is nothing particularly unusual about the "na-

ture" or the "terrain and uses" of the property condemned. The description of the land in the Lemoore cases—which is similar to the land in the other projects (P. 8, 17, 27)—is as follows (P. 1): "It is in an area largely devoted to agricultural uses and purposes and related activities, and land devoted to similar uses is generally similar in character in that area."

The second and fourth reasons (and, to some extent, the third) do not relate to the determination of just compensation for the "value of the property as a whole" (*Silberman* v. *United States*, 131 F. 2d 715, 717 (C.A. 1), but to the problems of apportioning the award among the various interests in the property. Thus, the district court stated (P. 2, emphasis added) that "[i]t is impractical, if not impossible, to try all of the remaining parcels in said cases and *various interests and estates taken*, before one jury," and it referred to the "divergent nature of estates claimed or taken, or of divergent ownerships." Rule 71 A(h), however, permits the court to refer to commissioners only the "issue of [just] compensation"; trial of all other issues shall "be by the court." The apportionment of an award among various claimants is not part of the issue of just compensation, and the district court therefore erred in referring the apportionment issue to commissioners.* See *United States*

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*That the court did refer the apportionment issue to the commissioners is clearly shown by its amended order of reference (P. 140), which directs them to make a "separate award of just compensation and valuation * * * with respect to each separate parcel, *interest, ownership*, or *claim* involved, and the

v. *70.39 Acres of Land*, 164 F. Supp. 451, 483 (S.D. Cal.), affirmed *sub nom. Carlstrom* v. *United States*, C.A. 9, Feb. 15, 1960; *United States* v. *111,000 Acres of Land, Etc.*, 155 F. 2d 683, 685 (C.A. 5); *United States* v. *53¼ Acres of Land, Etc.*, 176 F. 2d 255, 258 (C.A. 2); cf. *United States* v. *Dunnington*, 146 U.S. 338, 353.

b. As the court of appeals recognized (App., *infra*, pp. 27–28), the district court's reference "orders did * * * deal extensively with the problems of congestion facing the court." The district court, after referring to the number of condemnation cases pending in the District and the estimated time required if all of them were tried before juries, concluded that it "would be a denial of justice to compel those whose properties are taken in the within condemnation proceedings to await trial by jury of each tract or parcel involved in these cases" (R. 2–3).

But calendar congestion, and the hope that pending cases will be disposed of more quickly if jury trials are bypassed, are not valid grounds for a reference. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249; *McCullough* v. *Cosgrove*, 309 U.S. 634; *United States* v. *Kirkpatrick*, 186 F. 2d 393 (C.A. 3). As this Court stated in *La Buy* (p. 259), "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master. If such were the test, present congestion would make references the rule rather than the exception." Similarly, in *Kirkpatrick* the Third

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person, or persons, or entity claiming to be entitled to receive such award or *such portions thereof as each may claim to be entitled to receive*" (emphasis added).

Circuit, sitting *in banc*, held (p. 397) that "the district court is not empowered to make a general compulsory reference of all the issues in a group of admiralty cases, as the court is doing here, merely to relieve a congested docket and not because the cases themselves present exceptional circumstances which make reference of them necessary for the purposes of justice."

Moreover, the notion that reference to commissioners expedites litigation is, we believe, unfounded. "It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long" (*Adventures in Good Eating* v. *Best Places to Eat*, 131 F. 2d 809, 815 (C.A. 7)).

The government's experience with the use of commissioners in condemnation proceedings indicates that they delay rather than expedite the final disposition of such cases. The *Cunningham* case, which is still not completed more than seven years after the complaint was filed, is a good illustration of this unfortunate characteristic of references (see our *Cunningham* petition, pp. 13–14).[10] Indeed, this fact has been recog-

[10] Another example is *United States* v. *1,000 Acres of Land* (Civil 698, E.D. La.), in which commissioners were appointed on October 11, 1954, the hearings before them ended on April 28, 1955, and their report was not filed until October 28, 1958, 3½ years later. The matter is still pending before the district court on the government's objections to the commissioners' report.

nized even where the court upheld the reference. In *United States* v. *Delaware, L. & W. R. Co.*, 264 F. 2d 112, 115 (C.A. 3), certiorari denied, 361 U.S. 819, the court stated: "[W]e do not lose sight of the fact that among other things a reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expenses * * *." See, also, *United States* v. *Bobinski*, 244 F. 2d 299, 301 (C.A. 2).

There are numerous factors which combine to cause delay when condemnation cases are referred to commissioners. The hearings generally take longer, both because of the lack of judicial experience of the presiding commissioner in expediting the proceedings, and the inevitable tendency of laymen to permit the introduction of irrelevant and cumulative evidence. Moreover, the commissioners may be required to postpone hearings and other work on the cases because of the demands of their primary occupations. The commission is required to file a detailed report fully explaining the basis for the award; its preparation is often a time-consuming and difficult task. Thus, although a jury verdict promptly follows the presentation of evidence, in cases referred to commissioners many months often elapse between the closing of the hearing and the filing of the report.[11] There then

[11] In the *Cunningham* case, the hearings before the commission were completed in June, 1955; its first report (of two pages) was filed seven months later, in January, 1956. Following the reversal by the court of appeals, the case was remanded to the commission on September 5, 1957, to prepare a supplemental report "with reasonable promptness." The supplemental report was filed five months later, on Febru-

ensue district court proceedings on the confirmation of the report and appellate review which, as *Cunningham* shows, may result in vacation of the award because of the report's inadequacy. The result is further delay engendered by the preparation of a new report and another round of judicial proceedings.

It has also been the experience of the Department of Justice that more settlements result in cases scheduled for jury trial than among those referred to commissioners. When several tracts in the same or similar areas are referred to commissioners (as in the instant case), the defendants tend to await the first decision before discussing settlement, in order to ascertain the level at which the commissioners will make their awards. As we have indicated, that determination may take a considerable period, during which the commissioners may be hearing other cases. Settlements rarely occur, however, once the evidence has been presented. On the other hand, when the case is scheduled for jury trial, the judge frequently is able to effect a settlement between parties who are

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ary 3, 1958. See the joint appendix in the court of appeals in case No. 7402, pp. 25, 694; joint appendix in case No. 7817, pp. 21, 24, 29–44. Both joint appendices have been filed as part of the certified record in the *Cunningham* case.

In *United States* v. *Buhler*, 254 F. 2d 876 (C.A. 5), the Court of Appeals, on April 29, 1958, held that a report of a commission appointed in September 1955 was inadequate. The district court remanded the case to the commission in October 1958, and it was not until April 5, 1960, that it supplemented its original report to show in detail how it reached its total award of $1,268,850. No new evidence was taken nor was the total award changed by the supplemental report.

not too far apart. Thus, if the district court had granted the government's demand for jury trials in these cases, our experience indicates that a substantial number of these parcels probably would have been settled before trial.[12]

4. Since we believe that the right of the United States to a jury trial of the issue of just compensation "has been improperly denied" in this case, mandamus clearly was an appropriate remedy to vindicate that right. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 511; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. The court of appeals recognized (App., *infra*, p. 27) that the claim of the United States that the references improperly deprived it of its right to trial by jury, "would [if established] justify issuance of the writ." Indeed, an extraordinary writ may be the only way in which the United States can obtain effective appellate review of this important issue. For once the commissioners have made their award and it has been confirmed by the district court, a court of appeals has a natural "reluctance to cause further delay and expense and to set at naught the * * * years of work devoted by the district court and the commission to [the] case" (*United States* v. *Buhler*, 254 F. 2d 876, 878 (C.A. 5)).

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[12] A government affidavit showed that only 91 of the 725 parcels disposed of in the Northern Division of the District during the period from July 1, 1955 to December 31, 1958, or less than 13%, "required jury trials" (P. 36).

CONCLUSION

This case presents important questions of judicial administration relating to the use of commissioners in federal condemnation proceedings, which should be settled by this Court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APRIL 1960.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 16,707, Jan. 9, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, RESPONDENT

Upon Petition for Writ of Mandamus or Other Extraordinary Relief

Before: HAMLEY, MERRILL and KOELSCH, Circuit Judges.

Per Curiam: The United States seeks a writ of mandamus requiring respondent, as Judge of the United States District Court for the Southern District of California, to vacate certain orders entered by him.

The orders were entered in 21 actions brought by the United States for the condemnation of lands required in 4 federal projects.[1] By these orders the

[1](a) Lemoore Naval Air Station, condemnation of 30,490.34 acres, 4 cases involving 159 parcels and 1,475 owners; (b) Success Dam and Reservoir, condemnation of 3,754.64 acres, 3 cases involving 47 parcels, with many sub-parcels, and 330 owners; (c) Terminus Dam and Reservoir, condemnation of 2,920.93

determination of the issue of just compensation in all 21 cases was referred to commissioners under Rule 71A(h), Federal Rules of Civil Procedure.[2] A motion of the United States to vacate this order was denied by respondent after hearing, and the present proceeding was then instituted.

The United States contends that the orders of reference demonstrate that these are not proper cases for reference to commissioners under the Rule and that the considerations which prompted the action of respondent judge are not proper considerations under the Rule; that, under these circumstances, respondent judge was without discretionary authority to refer

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acres, 5 cases involving 33 parcels, with many sub-parcels, and 185 owners: (d) Casitas Dam and Reservoir, condemnation of 6,964.41 acres, 9 cases involving 39 parcels and 135 or more owners.

[2] "Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

the matters; that by his actions the United States wrongfully has been deprived of jury trials upon the issue of just compensation. In our view, such contentions if established, would justify issuance of the writ under *LaBuy* vs. *Howes Leather Co.*, 352 U.S. 249 (1957), and *Beacon Theatres, Inc.* vs. *Westover*, 359 U.S. 500 (1959). In seeking a review of an interlocutory order of the District Court by this extraordinary remedy, however, the burden upon the United States is a heavy one. There must be a showing of "clear abuse of discretion or 'usurpation of judicial power.'" *LaBuy* vs. *Howes Leather Co.*, supra, at 257; *Bankers Life & Casualty Co.* vs. *Holland*, 346 U.S. 379, 383 (1953). It must appear that "its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co.* vs. *Holland*, supra, at 384.

The position of the United States is that the purpose of the respondent judge was to relieve the calendar congestion facing the District Court. The United States asserts that by these orders respondent judge has referred all condemnation cases pending before him. It refers to the action of respondent judge as a "blanket order" and contends that, if such procedural practice is permitted, jury trial may well be lost to all litigants upon the issue of value in condemnation cases.

A condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule. Cf. LaBuy vs. Howes Leather Co., supra; United States vs. Kirkpatrick, 186 F. 2d 393 (3 Cir., 1951).

In these cases, however, the orders clearly demonstrate that the court had other considerations in mind. Compare United States vs. Theimer, 199 F. 2d 501 (10 Cir., 1952). The orders did, it is true, deal exten-

sively with the problems of congestion facing the court. This is perhaps understandable since respondent is the Chief Judge of the District and such problems are peculiarly his concern. In addition to calendar congestion, however, the orders gave consideration to (1) the nature of the property, its varied terrain and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensation was claimed; (3) the complexity of the issues involved; (4) the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each case were tried by a jury.[3]

The United States asserts that, while mention is made of these considerations, they are not shown to apply to any specific parcel or ownership, but are mentioned generally as applying to all lands included within each order. Further, it asserts that the orders wholly failed to show wherein the circumstances as to any of the considerations mentioned are extraordinary or unusual. The United States contends in this regard that a burden is upon the judge in each order of reference to show facts justifying his exercise of discretion under the Rule; that the orders are therefore insufficient to support an exercise of discretion.

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[3] Complexity has been recognized to be a valid consideration under the Rule: *United States vs. Buhler*, 254 F. 2d 876, 880 (5 Cir., 1958); *United States* vs. *Cunningham*, 246 F. 2d 330, 333 (4 Cir., 1957); *United States* vs. *Waymire*, 202 F. 2d 550 (10 Cir., 1953) (Semble). The same is true as to the consideration of quantity and uniformity: Note of Advisory Committee on Rules, Supplementary Report, 28 U.S.C.A., Rule 71A (1958 Supp.); *United States* vs. *Robinski*, 244 F. 2d 299, 300 (2 Cir., 1957) (dictum).

This contention we reject. The United States concedes that as to each project various parcels taken are similar in character and use. In cases such as these, involving multiple takings for large governmental projects, it is our understanding that the Rule allows as proper a grouping of similar parcels for consideration, to the end that discrimination be avoided and uniformity in compensation be had. See authorities cited in footnote 3. The very use of the word "quantity" in the Rule lends support to such construction.

Each order shows upon its face that all the listed considerations were in the mind of the judge as to the lands taken for each project and were felt by him to warrant an exercise of his discretionary authority. We shall not, for lack of specification or detail, presume to the contrary. The burden instead is upon the United States to make a clear showing to this Court that such factors were not involved in these cases. This burden the United States has failed to meet.

Writ denied.

(Endorsed:) Per Curiam Opinion. Filed January 9, 1960.

FRANK H. SCHMID, *Clerk.*

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1959

No. 850

UNITED STATES OF AMERICA,
Petitioner,

vs.

HONORABLE PERSON M. HALL, Chief Judge, United States District Court for the Southern District of California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 274 F. 2d 856.

QUESTION PRESENTED

The question presented is:

Whether the Court of Appeals abused its discretion in denying a writ of mandamus against the Chief Judge of the District Court which would have compelled him to vacate orders he had entered pursuant to the discretionary authority granted to him by Rule 71A(h) F.R.C.P. by which orders he referred to commissioners twenty-one separate condemnation cases instituted by the United States and in which orders he stated the grounds upon which he determined that the interest of justice would be served by such reference.

STATEMENT

Petitioner, on or about December 14, 1959, filed in the Court of Appeals for the Ninth Circuit a petition seeking from that court a writ of mandamus, or other extraordinary relief, requiring the Chief Judge of the United States District Court for the Southern District of California to vacate orders of reference which he had entered between May 7, 1959, and August 3, 1959 (Petition, 4-7) in twenty-one separate condemnation cases by which orders the judge had, pursuant to Rule 71A(h) F.R.C.P. referred to commissioners the issue of compensation in the cases (Petition, 3). The twenty-one cases were filed in connection with four government projects involving in all more than 44,000 acres, consisting of 496 parcels owned or claimed to be owned, or an interest in which was owned or claimed to be owned, by 2,200 persons

or entities. All cases involved in each project were referred to the same commissioners (P. 1-31).[1]

Among the cases referred were four in connection with property and easements taken for the Lemoore Naval Air Station project involving, as the District Court found, more than 30,000 acres (P. 4, 6); three in connection with land taken for the Success Dam and Reservoir project, involving in excess of 3,700 acres (P. 8-14); five in connection with the Terminus Dam and Reservoir project, involving in excess of 2,900 acres (P. 16-21); and nine cases in connection with the Casitas Dam and Reservoir project, involving in excess of 6,900 acres (P. 23). In the Lemoore Naval Air Station project there were involved 373 parcels and 1,575 owners (P. 1, 6); in the Success project there were involved 51 parcels and 330 owners (P. 8, 12, 14); in the Terminus project there were involved 33 parcels and 178 owners (P. 16, 21); in the Casitas project there were involved 39 parcels and 135 owners (P. 26). The property is of varying terrain and devoted to various uses (P. 27).

As the Court of Appeals noted in its opinion, the orders of reference indicated the grounds upon which they were based, including in addition to the congestion of the Court's calendar and the length of time which would be involved in trials by juries, "(1) the nature of the property, its varied terrain, and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensa-

[1] "P" refers to the appendices to the Petition filed by the government in the Court of Appeals.

tion was claimed; (3) the complexity of the issues involved; (4) the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each were tried by a jury" (274 F. 2d at p. 859).

In its order of reference the Court noted these factors and noted also that the rights and interests for which just compensation must be determined are or may be of varied nature, and the issues will be complicated (P. 2).

The record does not show the present posture of the cases that were set for trial before the commissioners commencing on December 1, 1959 (P. 143).

ARGUMENT

It would, perhaps, seem proper to state at the outset that the petition for writ of mandamus filed by the United States in the Court of Appeals might primarily, not a disposition of a "case" or "controversy," but the establishment of a procedural policy for the District Court. The petition in the Court of Appeals, and the petition here, do not point out that the District Court abused its discretion in any particular case (and there are twenty-one separate actions involved), but assert rather that the policy of the Dis-

trict Court was wrong in appointing commissioners to hear the issue of compensation in all of them.[2]

Indeed, petitioner frankly argues in its petition for a reversal of the "trend" of all district courts to refer condemnation cases to commissioners (Petition, 12-13). A great part of petitioner's argument is in fact devoted to an attack upon the reference provision of Rule 71A(h) itself (Petition, 20-23).

But there is here involved a specific judgment entered in an original proceeding in the Court of Appeals. And the question before the Court is not trends or policies or various district court practices or the justification for the Rule, but the correctness of the specific judgment. We confine our discussion therefore to that matter.

THE COURT OF APPEALS PROPERLY DENIED THE WRIT OF MANDAMUS

1. The Denial of the Writ Was Within the Discretion of the Court of Appeals.

As this Court has said, "mandamus, prohibition, and injunction against judges are drastic and extraordinary remedies. . . . As extraordinary remedies they

[2] Petitioner attacks also the scope of the orders of reference because they provide for separate awards "with respect to each . . . parcel, interest, ownership or claim involved." The argument has no relevancy. The question here is solely one involving reference. As the authorities cited by petitioner indicate, the United States will have no further liability once it has paid the amount determined as just compensation, whether that amount be determined by the judge, a jury, or a commission. In any event, the scope of the amended orders was not too broad, as petitioner itself argues at pages 15-16 of its petition in the *Cunningham* case.

are reserved for really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258; 259. Especially in such cases, then, does the Court of Appeals have the discretion to deny writs of mandamus. For in every case these writs "may be granted or withheld in the sound discretion of the court." *Roche v. Evaporated Milk Association*, 319 U.S. 21, 25; *La Buy v. Howes Leather Co.*, 352 U.S. 249.

If the Court of Appeals decided, in its discretion, that this is not such an extraordinary cause as to warrant the issuance of mandamus against a judge, one can hardly say that the Court abused its discretion, particularly in the light of this Court's strictures.

And this is no extraordinary cause. If the District Court erred in making its order of reference, and as we show (infra, p. 11) the government has failed to demonstrate such error, then it may be corrected on appeal. *U. S. v. Bubler* (C.A. 5) 254 F.2d 876; *U. S. v. Theimer* (C.A. 10) 199 F. 2d 504.[3] Because such error, if it exists, can be corrected on appeal, the Court of Appeals properly denied mandamus. For mandamus may not be used as a substitute for appeal. *Ex parte Fahey*, 332 U.S. 258; *Roche v. Evaporated Milk Association*, 319 U.S. 21.

As the court pointed out in *United States v. Bobinski* (C.A. 2) 244 F. 2d 299, 301, the action of the

[3] It is of interest to note that both these cases, upon which the petitioner leans so heavily, were decided on *appeal*, not on a petition for extraordinary writ, and only in the *Theimer* case was the trial court reversed.

District Court "can be at most only erroneous, not beyond jurisdiction." The traditional use of the extraordinary writ which the government sought has been to confine a lower court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so. *Bankers Life and Cas. Co. v. Holland*, 346 U.S. 379, 382. There is, therefore, no occasion for the use of the writ in this case.

That the District Court has authority to refer condemnation cases to commissioners is beyond question. Rule 71A(h) explicitly gives it the power "in its discretion" to order that, "because of the character, location, or quantity of the property to be condemned, or for other reasons in the interests of justice" the issue of compensation shall be determined by commissioners.

All that is present in this case is a disagreement between the government and the District Court as to how the Court should exercise the discretion which the Rule so clearly vests in it. And the mandamus was sought to compel the Chief Judge to substitute the government's judgment for his own. It has never been thought that a judge could be mandamused into exercising in a particular way discretion which has been reposed in him. *In re Park & Tilford*, 245 U.S. 82; *Ex Parte Slayter*, 246 U.S. 128.

Beacon Theaters v. Westover, 359 U.S. 500 is not to the contrary. There the effect of the District Court's order was to deny to a party a constitutional right to a jury trial. The Constitution does not vest

in the court the discretion, on any basis, to deny that right, and the District Court acted beyond its power when it did so.

But there is no constitutional right of the United States to a trial by jury of the issue of compensation in condemnation cases. *Bauman v. Ross*, 167 U.S. 548; *U. S. v. Buhler* (C.A. 5) 254 F. 2d 876. The District Court is, as we said, vested with discretion. If its conclusion is wrong, it may be corrected on appeal. "Judicial administration," to which petitioner directs this Court's attention (Petition, 11), would break down completely if a court were subject to mandamus every time it made a discretionary interlocutory ruling with which a party did not agree.

The argument that appeal is inadequate because a Court of Appeals may be reluctant to reverse after a long trial could be made in every case involving unappealable interlocutory orders. Certainly it would be just as applicable in remand cases, where the courts have repeatedly denied mandamus. It may be added that this Court is here, and if, as petitioner suggests, the question is of such great importance, a review of an adverse Court of Appeals decision on an appeal may be sought of this Court.

It is respectfully submitted that this is not the "extraordinary cause" which warrants mandamus against a judge. The most that could be contended here is that the Chief Judge erred in the exercise of his discretion. Mandamus, we submit, is not the proper remedy to correct such error, even if the contention could

be upheld. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379.

2. There Was No Showing in the Court of Appeals of a Right to Mandamus.

Because the writ is one "reserved for really extraordinary causes," the courts have uniformly required that one who petitions for mandamus must show that his right thereto is "clear and indisputable." *Bankers Life and Cas. Co. v. Holland*, supra, (p. 384).

The showing made by the government in its application for the writ was only its claim that the Chief Judge of the District Court referred substantially his entire docket of condemnation cases to commissioners;[1] that the orders of reference all made the same findings, some of the orders containing the findings only by reference to other orders; and that the character of the property was similar to that in many other condemnations. In the record were affidavits of various Assistant United States Attorneys (P. 33-78) in which they described the various tracts condemned and in one of which was a tabulation with respect to condemnation cases filed in the Southern District of California. The government argued that those affidavits showed that the findings of the Chief Judge were wrong.

One of the alternative grounds stated in Rule 71A (h) upon which the District Court may base an order

[1]It does not appear that the record supports the claim. The tabulation in the affidavit of the Assistant United States Attorney (P. 34) shows 111 pending cases on June 30, 1959, only 21 of which apparently have been referred to commissioners by the Chief Judge.

of reference is "quantity of property." In the Lemoore Naval Air Station project the land involved consisted of more than 30,000 acres—almost 47 square miles (P. 1). In the Casitas Dam project the land involved is almost 7,000 acres—over 10 square miles (P. 26). Who is to say that 30,000 acres or 7,000 acres is not a "quantity of land" as contemplated by the Rule?[5] Is the government's mere statement that that is not sufficient to sustain an order of reference a "clear and indisputable" showing of a right to mandamus? Another of the alternative bases stated in the Rule is the character of the property. Is the government's bare statement that the character of the property is similar to that in many other condemnations a "clear and indisputable" showing of a right to mandamus? And so with the other bases upon which the Chief Judge rested his order. A "clear and indisputable" right to mandamus would, it is submitted, require more than a mere showing of disagreement with the conclusions of the judge. At the least it must show clearly and indisputably either that the judge exceeded his authority or that he abused his discretion. The Court of Appeals found that the government failed to sustain that burden.

Petitioner's argument that the Chief Judge's orders referring twenty-one cases to commissioners indicate an improper exercise of judicial discretion

[5] Some indication of what is meant by "quantity of land" is given in the Committee Notes: "In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen." Notes of Advisory Committee on Rules, 28 U.S.C.A. 71A (1959 Supp.) p. 354.

carries no persuasion in the absence of a clear showing that in every one of the cases the facts did not justify reference. It must be remembered that the writ of mandamus sought in this case would have compelled the Chief Judge to vacate his orders with respect to every one of the twenty-one cases. To sustain such a writ, if it is sustainable in any event, would require a showing that the Chief Judge abused his discretion in every single case.[6] There is no such showing.

3. The District Court Did Not Abuse Its Discretion.

Purposely Rule 71A(h) gives to the District Court a broad discretion in determining whether condemnation cases shall be referred to a commission. As the Advisory Committee noted:

> "It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court." Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A (1959 Supp.) p. 354.

That the Chief Judge in these cases did take into consideration the very matters which are stated in the Rule is evident from the orders themselves. As the Court of Appeals pointed out in its opinion, the Chief Judge considered the quantity and nature of the property and its varied terrain and uses, the kind or type

[6] On the record before the Court of Appeals, it would have been impossible for that Court to have granted mandamus as to merely some of the cases, even if that were permissible.

or nature of the rights or interests in the property, the complexity of the issues involved, the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury, and the probability that the appointment of commissioners would result in more uniformity of awards for like property. To a great extent those are the very matters which the Rule requires the court to consider. Surely it cannot be successfully contended that a judge in his order must state the processes of ratiocination by which he determined that these factors required trial by commissioners in order that the interest of justice be properly served. It is sufficient that he state the basis upon which the order rests. When the statement is adequate in law, as it is in this case, we know of no authority under which he can be compelled to arrive at a conclusion different from that which his judicial conscience impelled. Surely if the grant of discretion given to the judge by the Rule means anything, it means that he "must exercise his authority according to his own understanding and conscience." *United States v. Shaughnessy*, 347 U.S. 260, 267.

In *United States v. Theimer* (C.A. 10) 192 F. 2d 501, which reversed on appeal an order of reference, the Court pointed out that "the trial court made no statement or finding of fact as to what prompted it to conclude that the interest of justice demanded the invocation of the extraordinary, rather than to permit the ordinary procedure contemplated by the Rule." (p. 504)

But the Chief Judge in the instant cases stated with a great deal of specificity the factors which induced him to conclude that the interest of justice required a reference, factors which, as we said, were to a great extent those stated in the Rule. The *Theimer* case, therefore, furnishes no standard by which this case can be judged.

In the recent and as yet unreported case of *Benecke v. Weick* (C.A. 6) .....F.2d ..... (decided March 2, 1960), the court denied a writ of mandamus to compel the trial judge to vacate an order of reference, where the trial court's statement of the basis for his order closely paralleled the finding of the Chief Judge in this case. The Court said:

> "Under Rule 71A(h), Rules of Civil Procedure, the trial judge has the right in his discretion to enter an order that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a Commission of three persons appointed by the court. In the present case, the trial judge exercised the discretion vested in him, expressing the opinion that it was in the interest of justice that the entire case be referred to a commission."[*]

The Sixth and Ninth Circuits are therefore in agreement that under the circumstances a writ of mandamus should not issue to compel a trial judge to va-

[*] The text of the opinion is printed as an appendix to this brief. It may be noted that it was the landowners, not the government, who requested a jury trial and sought mandamus in that case.

cate an order of reference. Insofar as we have been able to find, no Court of Appeals has decided to the contrary. The courts have doubtless realized that granting mandamus in such a case would open a Pandora's box of evils far greater than any that might result from a mere error in the exercise of a discretion lodged in a judge.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, May 6, 1960.

Respectfully submitted,
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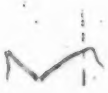
(Appendix Follows.)



Appendix

BENEKE v. WEICK

U. S. Court of Appeals, Sixth Circuit, March 2, 1960

On petition for writ of mandamus. Before McALLISTER, Chief Judge, MIELER and CECIL, Circuit Judges.

PER CURIAM. On March 9, 1956, the United States filed a condemnation suit in the District Court for the Northern District of Ohio against forty-six defendants owning twenty-three separate parcels of land aggregating 44.314 acres. On October 1, 1959, the District Judge entered an order appointing Commissioners to determine the issue of just compensation as to all defendants, overruling objections on the part of persons having an interest in twelve parcels, who had requested a jury trial of said issue.

This order was in accordance with the views expressed by him in a written Memorandum filed a short time prior thereto. In this Memorandum it was pointed out that the tracts of land owned by those opposing the appointment of the Commission varied in size from .057 to 4.530 acres, and totaled approximately 45% of the land taken, that eight separate jury trials would be required, in which trials essentially the same expert evidence would be adduced, as the tracts were for the most part adjacent to each other and would be affected by the same considerations in determining their valuation, that such procedure would be repetitious, wasteful of time and money and inimical to the best interests of justice,

that the docket in his court was a congested one, and that it was in the interest of justice that the entire case be referred to a three man commission and not determined piecemeal in repetitious individual jury trials.

On October 10, 1959, the eight petitioners herein, who had previously requested jury trials, moved for a reconsideration of the order of October 1, 1959, which motion was overruled on November 18, 1959. In overruling the motion, the District Judge referred to the location of the land outside the city of Cleveland, where the trial would be held; to the fact that the tracts owned by the petitioners were contiguous to other tracts of more than eighty times in area which were involved in the same action and to which basically the same considerations would apply, which tracts were being evaluated by the Commissioners without objection from the owners thereof; and to the fact that the use of Commissioners for evaluating all of the property involved would tend to produce uniformity in valuation throughout the entire area involved.

The petitioners thereupon filed their present action in this court under the provisions of the all-writs statute, Section 1651(a), Title 28, U. S. Code, praying that an order be issued staying proceedings in the District Court and to strike from the order of October 1, 1959, such part thereof as would deny a jury trial to these petitioners.

We have heretofore on several occasions pointed out that under Supreme Court rulings mandamus,

against a judge under the all-writs statute is an extraordinary remedy and is reserved for really extraordinary causes. It cannot be used as a substitute for an appeal. Roche v. Evaporated Milk Association, 319 U. S. 21, 26; Ex. parte Fahey, 332 U. S. 258; Bankers Life & Casualty Co. v. Holland, 346 U. S. 379; Massey-Harris-Ferguson v. Boyd, 242 F.2d 800, C. A. 6th, cert. denied, 355 U. S. 806; Walker v. Brooks, 251 F.2d 555, C. A. 6th; Allstate Insurance Co. v. United States District Court, 264 F.2d 38, C. A. 6th; Lemon v. Druffel, 253 F.2d 680, C. A. 6th, cert. denied, 358 U. S. 821; Panhandle Eastern Pipe Line Co. v. Thornton, 267 F.2d 459, C. A. 6th, cert. denied, 361 U. S. 820. In the case last cited we quoted with approval the following statement from In re Josephson, 218 F.2d 174, C. A. 1st; "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

In the case under consideration the petitioners were not entitled to jury trial as a matter of right. Bauman v. Ross, 167 U. S. 548, 593. Under Rule 71A(h), Rules of Civil Procedure, the trial judge has the right in his discretion to enter an order that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a Commission of three persons appointed by the court. In the present case, the trial judge exercised

the discretion vested in him, expressing the opinion that it was in the interest of justice that the entire case be referred to a Commission. The order is subject to review for alleged abuse of discretion on his part when a final judgment is entered. United States v. Theimer, 199 F.2d 501, C. A. 10th; United States v. Buhler, 254 F.2d 876, C. A. 5th. In the Theimer case it was held *on final review* that there was an abuse of discretion. But, it was not a mandamus case. In the Buhler case the Court of Appeals held *on review* of the final judgment that there was no abuse of discretion in denying the demand for a jury trial.

In Ex parte Simons, 247 U. S. 231, and Black v. Boyd, 248 F.2d 156, C. A. 6th, relied upon by the petitioners, the applicants were entitled to a jury trial as a matter of right. There was no discretion vested in the District Judge to deprive them of that right.

The fact that the ruling is an important one in the conduct of the trial and that, being an interlocutory order, a review of it on appeal must be postponed until after the case has been disposed of in the District Court, does not entitle the petitioners to an immediate review of the ruling. City of Morgantown v. Royal Insurance Co., Ltd., 337 U. S. 254, 258-259; Massey-Harris-Ferguson v. Boyd, supra, 242 F.2d 800, 802, C. A. 6th, cert. denied, 355 U. S. 806.

Without expressing at this time any opinion on the correctness of the ruling, we are of the view that the case presented is not of such an extraordinary nature as to justify the issuance of the writ applied for. The application for the writ is denied.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 850

UNITED STATES OF AMERICA,

Petitioner,

vs.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

UNITED STATES OF AMERICA,

Petitioner,

vs.

HONORABLE PEIRSON M. HALL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent.

Brief of Amicus Curiae in Opposition to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

This brief is filed on behalf of the following named persons as *amicus curiae,* in opposition to a petition for writ of certiorari, the consent of counsel for petitioner and of the respondent in the above-entitled matter having been given pursuant to the rules of this Court:

Edith H. Hoffman
Southern Realty Company, a corporation
Florence G. Baldwin
V-R Ranch Co., a Corporation
Elizabeth Winship Alison
El Rancho Cola, a co-partnership
Muriel E. Cockerham
Ralph B. Nunnelly

John H. Dunshee
Frank G. Dunshee
Edward L. Lau
Margaret C. K. Lau
Charlotte F. Dunshee
Harvey Scott Dunshee, as guardian of the Estate of Charlotte F. Dunshee, an incompetent
Jack M. Eakins
Adele L. Eakins
Dorothy Battin
Boston Ranch Company, a corporation
R. A. Rowan & Co., a corporation
C. F. Costa
John Barcellos
Mary Barcellos
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O. W. Cave
Belle M. Cave
V. W. Finch
Clara B. Rutherford
Marvin Putnam
Fred Wilcox
Guy Wilcox
John Lewis
Jessie Lewis
Ray Traegor
Marcel Bertrand
Forrest Homer

All of the above named persons and corporations are landowners who are defendants in certain condemnation actions, the reference of which to commissioners gives rise to the petition for certiorari.

Opinion Below.

The opinion of the Court of Appeals is reported at 274 F. 2d 856.

Questions Presented.

1. Whether the Court of Appeals for the Ninth Circuit abused its discretion in denying a writ of mandamus against the Honorable Peirson M. Hall, the trial judge in particular actions, which would, if granted, have compelled him to vacate orders of reference of certain condemnation cases to commissioners pursuant to a discretion granted to him by Rule 71A(h), Federal Rules of Civil Procedure.

2. Whether the petitioner has established before the Court of Appeals for the Ninth Circuit that its right to the extraordinary writ of mandamus is clear and undisputable.

3. Whether the Honorable Peirson M. Hall, Chief Judge of the Federal District Court for the Southern District of California and the trial judge in particular actions involving the exercise of the power of eminent domain under the laws of the United States, where a jury trial had been demanded by the United States, properly exercised a discretion specifically granted by Rule 71A(h), Federal Rules of Civil Procedure, in referring the issue of just compensation in such actions to commissions pursuant to that rule where such references were made by him by reason of the character, location and quantity of the property to be condemned and for other reasons in the interest of justice.

4. Whether the orders of reference to commissioners by the Honorable Peirson M. Hall improperly referred to such commissioners anything other than the issue of just compensation, and whether petititoner has any standing to raise this issue.

Rule Involved.

Rule 71A(h), Federal Rules of Civil Procedure, which governs in this matter, is printed in the petition for certiorari at page 2 thereof.

Statement.

The petition for certiorari questions the propriety of a denial by the Court of Appeals for the Ninth Circuit of a writ of mandamus sought by the petitioner. That writ if granted would have compelled the Honorable Peirson M. Hall to vacate references by him of certain eminent domain cases to commissions pursuant to Rule 71A(h), Federal Rules of Civil Procedure.

The Properties Involved.

In the period beginning on August 1, 1956 the United States of America filed four sets of eminent domain proceedings, which, for the purpose of convenience, are designated the Casitas Dam and Reservoir cases, the Lemoore Naval Air Station Cases, the Success Dam Cases, and the Terminus Dam Cases. There are involved in the Casitas Dam and Reservoir Cases 39 parcels and 135 persons or entities owning or claiming to own various tracts therein. (P. 26-27).[1] There are involved in the Lemoore Naval Air Station Cases 374 parcels and

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[1] "P." refers to the appendices to the Government's "Petition for Writ of Mandamus or other extraordinary relief in the Court of Appeals.

1537 owners. (P. 1.) There are involved in the Success Dam Cases 51 parcels and 330 owners. (P. 8, 12, 14.) There are involved in the Terminus Dam Cases 33 parcels and 185 owners. (P. 16.) The amount of land taken by the United States in the eminent domain proceedings involved in each of those sets of cases was large: in excess of 6,900 acres in the Casitas Dam and Reservoir Cases (P. 26); in excess of 30,400 acres in the Lemoore Naval Air Station Cases (P. 1); in excess of 3,600 acres in the Success Dam Cases (P. 8, 13, 14); and in excess of 2,700 acres in the Terminus Dam Cases (P. 17). The properties involved in each of the groups of cases were located at considerable distances from the normal place of federal trial: seventy-five miles in the Casitas Dam and Reservoir Cases (P. 94); forty miles in the Lemoore Naval Air Station Cases (P. 39); seventy-two miles in the Success Dam Cases (P. 47); and forty-three miles in the Terminus Dam Cases (P. 58). View of the properties by the body determining the issue of just compensation is hampered in the Casitas Cases, at least, by inaccessability (P. 87, 94, 123). Each of the groups of cases involve lands of varying characteristics, although lands devoted to similar uses in each group of cases are generally of similar character (P. 1, 8, 17, 27). Complex issues of valuation are present (P. 1, 8, 17, 27). The size of the takings and the number of separate cases filed by the United States make trial of any one group of related cases before one jury highly impracticable (P. 2, 9, 17, 27) so that uniformity of award for like property in any one of the four areas will be better achieved through the appointment of a commission appointed pursuant to Rule 71A(h) than by a jury trial (P. 3, 10, 19, 28). It should be noted at this juncture that the petition for certiorari as well as the

application for writ of mandamus contend that all of the properties in question are merely simple agricultural lands.[2] This contention finds no support whatsoever in the record (P. 1, 8, 17, 27, 85-87, 93, 95, 99-100, 104-106, 107-109, 111-112, 120-123, 128-130, 134).

The Proceedings to Date.

On May 7, 1959 the Honorable Pierson M. Hall, Chief Judge of the Federal District Court for the Southern District of California, referred the Lemoore Naval Air Station Cases to a commission of three persons appointed by him pursuant to the discretion granted by Rule 71A(h) (P. 1). On May 12, 1959 Judge Hall similarly referred the Success Dam Cases and the Terminus Dam Cases to a commission (P. 8). On May 20, 1959 he similarly referred the Casitas Dam and Reservoir Cases to a commission (P. 23). The orders of Judge Hall exercising the discretion granted to him by Rule 71A(h) based the reference to commissioners upon the following:

(1) The size of the properties involved (P. 1, 6, 8, 13, 14, 16, 22, 24);

(2) The location of the property (P. 1, 6, 8, 13, 14, 17, 22, 26);

(3) The nature of the property and its varied terrain and uses (P. 1, 8, 17, 27);

(4) The type and kind or nature of the rights or interests in the property claiming just compensation (P. 1-2, 8, 17, 27);

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[2]While the petition (p. 4) states that the order of reference in the *Lemoore Naval Air Station* case is typical in describing the property involved as an area largely devoted to agricultural uses, in fact the orders on the other three groups of cases describe the respective lands involved as of "varying terrain and devoted to various uses" (pp. 8, 17, 27).

(5) The complexity of the issues involved (P. 2, 8, 17, 27);

(6) The impracticability if not impossibility of trying the issue of just compensation of the various properties before one jury (P. 2, 8-9, 17-18, 27);

(7) The crowded condition of the calendar of the District Court for the Southern District of California and the desirability of the expeditious resolution of the groups of the cases referred to commissioners (P. 2, 9, 18, 27);

(8) The probability that the appointment of commissioners in each of the groups of related cases will result in more uniformity of awards for like property involved in the particular group of cases than could be expected if each case were tried by a jury (P. 3, 10, 19, 28).

Subsequently the petitioner moved to vacate the orders of reference and filed affidavits in support of its motion (P. 31-78). Various of the landowners filed counter affidavits (P. 82-139). The motions of the petitioner were overruled by the trial court (P. 140).

Shortly after their appointment the various commissions met and commenced proceedings. Some cases have been concluded. Others are well along in trial, and in virtually all instances the respective commissions have already viewed all or most of the properties, the issue concerning the valuation of which will come before them.[3] In virtually all instances each commission has heard much evidence common to a number of all of the cases referred to it. On or about December 12, 1959 the United States

[3]Many of these events have occurred subsequent to the proceedings in the Court of Appeals, see appendix page 1 *et seq.*

of America filed a petition for a writ of mandamus with the Court of Appeals for the Ninth Circuit, seeking an order requiring Judge Hall to vacate the reference to commissioners discussed above. On January 9, 1960 the Court of Appeals for the Ninth Circuit issued its opinion which is reported at 274 F. 2d 856. That opinion stated that while congestion of the calendar of the trial court standing alone is not sufficient reason for a Rule 71A(h) reference, that the orders of Judge Hall referring the particular groups of cases here involved to commissions gave consideration, in addition to calendar congestion, to (1) the nature of the property, its varied terrain and uses, (2) the type or kind and nature of the rights or interests in the property for which just compensation was claimed, (3) the complexity of the issues involved, (4) the improbability, if not impossibility, of the trial of the issue of just compensation of the various related properties before one jury, and (5) the probability that the appointment of commissioners will result in more uniformity of awards for like property than could be expected if each case were tried by a jury (Pet. for Cert. p. 28). The Court of Appeals also founded its opinion upon the proposition that it should not, in the case of proceedings seeking the extraordinary writ of mandamus presume that the orders of reference were not made upon proper ground but that the burden instead was upon the petitioner to make a clear showing that the relevant factors stated in a particular order of reference were not involved in that case. The Court of Appeals then found that the United States had failed to meet such burden.

Reasons for Denying the Writ.

Summary of Reasons Why the Writ Should Be Denied.

1. No important issue of judicial administration is presented by these particular cases since Courts of Appeal in seven separate circuits have considered Rule 71A(h) Federal Rules of Civil Procedure and have applied uniform tests in determining the propriety of references thereunder.

2. The statistical data alleged by the petitioner to justify the issuance of the writ is incomplete in a manner which makes that data highly misleading as it is pertinent to the particular cases here involved.

3. A petition for certiorari is not a proper proceeding in which to seek an amendment to a Federal Rule of Civil Procedure.

4. The Court of Appeals did not abuse its discretion in denying the extraordinary writ of mandamus.

5. The petitioner did not establish before the Court of Appeals that its right to the extraordinary writ of mandamus is clear and indisputable.

6. The District Court Judge properly exercised his discretion in referring these particular cases to commissioners pursuant to Rule 71A(h), Federal Rules of Civil Procedure.

7. The orders of the District Court Judge do not refer to commissioners anything in excess of that which he was empowered to refer by Rule 71A(h).

No Important Issue of Judicial Administration Is Presented by These Particular Cases.

Rule 71A(h) gives to the trial judge a discretion in determining whether a jury or a commission will hear federal eminent domain cases where a jury is demanded. In granting that discretion, the Rule sets forth standards which will govern its exercise. This proceeding before this Court is not the time or the place to argue the wisdom of Rule 71A(h) or to seek its amendment. Courts of Appeal for the Second Circuit,[4] Third Circuit,[5] Fourth Circuit,[6] Fifth Circuit,[7] Eighth Circuit[8] Tenth Circuit,[9] and in the instant case, the Ninth Circuit, have considered validity of references under Rule 71A(h) and have set forth consistent standards.

Both the Rule and the decisions of the various courts of appeal establish that the validity of a reference pursuant to the Rule is to be tested by the standards set forth in Rule 71A(h). The fact that a particular judge may have referred a particular proportion of his total docket of condemnation cases to commissioners is, we submit, without materiality on the issue of the propriety of any particular reference without a showing that such

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[4]*United States v. Bobinski*, 244 F. 2d 299, 301 (C. A. 2).

[5]*United States v. Delaware, Lackawanna and W. R. Co.*, 264 F. 2d 112.

[6]*United States v. Cunningham*, 246 F. 2d 330.

[7]*United States v. Buhler*, 254 F. 2d 876.

[8]*United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492.

[9]In an earlier case, *United States v. Theimer*, 199 F. 2d 330, the Court of Appeals for the Tenth Circuit found a reference invalid. It applied the same standards in the later cases of *United States v. Waymire*, 202 F. 2d 550, and *United States v. Wallace*, 201 F. 2d 65, and found that reference to commissioners in those cases met the standards.

reference on its own facts is improper. It is also submitted that the statements made in the petition regarding the number of references to commissioners made in other districts do not present a reason why a writ of certiorari should be granted in the particular cases here involved. Firstly, the statistical statements made in the petition find no support in the record. Secondly, the statistics cited are, on their face, incomplete in that no data is given regarding the total number of pending eminent domain proceedings. Statistics presented by the Department of Justice for other purposes do shed some light upon that necessary information however. In the submission of the Department of Justice to the Congress in support of its requested appropriation for the fiscal year 1961 statistical data on work load was presented by the Department (Hearing Before the Committee on Appropriations United States House of Representatives on H.R. 1666, p 153). That data showed that there were pending as of the end of fiscal year 1959 a total of 39,846 land acquisition cases in the Department of Justice, of which 26,655 were condemnation cases. Thus, the 3,307 cases stated by the Department of Justice in its petition for certiorari (of which 1,377 are pending in the Eastern and Western District of Texas) to have been referred to commissioners constitute a significantly small percentage of the total condemnation cases stated by the Department of Justice to be pending.

In the Southern District of California there have been filed since the year 1951 when Rule 71A(h) was promulgated, 247 eminent domain cases involving 7,280 tracts. Of those tracts 5,562 were unadjudicated as of October 2, 1959 (Supplemental Record, p. 2). There have been references to commissioners on that district

pursuant to that Rule of only 21 cases involving only 496 tracts in the entire time the Rule has existed. If the Department of Justice's statistical method, which uses tracts or parcels as the unit of measurement, is followed, something less than 7% of the total tracts filed in eminent domain proceedings in the Southern District of California since the enactment of Rule 71A(h) and less than 10% of pending tracts in that district have been referred to commissioners pursuant to that Rule. The statistics thus indicate a very restricted use of Rule 71A(h) references on the part of the district judges. Such being the case, there appears to be no real reason why the administration of justice calls for the granting of the writ of certiorari in the cases here involved.[10]

A Petition for Certiorari Is Not the Proper Proceeding in Which to Seek an Amendment To a Federal Rule of Civil Procedure.

Much of the petition for certiorari is directed to the proposition that certain of the standards for reference to commissions set forth in Rule 71A(h) should not be there. It is respectfully submitted that there is available to the Department of Justice an orderly procedure to amend or repeal a rule duly adopted as one of the Federal Rules of Civil Procedure. That orderly procedure, it is submitted, does not include the seeking of such an

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[10]The use of commissioners pursuant to Rule 71A(h) may very well disappear entirely for reasons entirely extraneous to the Rule or its operation. See H. R. 11666 enacted by the House of Representatives after testimony by persons appearing for the Department of Justice and which is presently pending before the Senate. Section 207 of H. R. 11666 provides:

> "None of the funds appropriated by this title may be used for the compensation of commissioners appointed in lands cases under Rule 71A(h) of the Federal Rules of Civil Procedure."

amendment or repeal by way of a petition for certiorari. If a change or repeal of a rule is sought before the Judicial Conference and the statutory process followed, it is possible for information to be compiled from all districts upon which an informed determination can be made. If, on the other hand, as here, an amendment or restriction to a rule is sought by a petition for certiorari and the petitioner, as here, supports its petition by statistics outside the record, there is no effective way to test the validity of the statistical data alleged to be present in other districts. It is respectfully submitted that the use of the petition for certiorari should be confined to seeking a review of the record in a particular case.

The Court of Appeals Did Not Abuse Its Discretion in Denying a Writ of Mandamus.

Mandamus against a judge is an extraordinary and drastic remedy, *Ex parte Fahey,* 332 U. S. 258, and in every case may be granted or withheld in the sound discretion of the court. *Roche v. Evaporated Milk Association,* 319 U. S. 21; *LaBuy v. Howes Leather Co.,* 352 U. S. 249.

In the case of the reference to Commissioners under Rule 71A(h) here involved, no extraordinary circumstances are present which would have justified the Court of Appeals in exercising its discretion to proceed by way of the extraordinary writ of mandamus. Rule 71A(h) grants to the District Judge a discretion to refer a case to a commission for trial of the issue of just compensation in lieu of a jury where a jury trial has been demanded. The Rule sets forth certain standards to be considered by the trial judge in exercising the discretion granted. Here the orders of reference clearly show that the trial judge considered the factors stated in the Rule.

When the Court of Appeals refused to issue a writ of mandamus, under such circumstances, it cannot be said that there was any abuse of discretion on the part of that Court, recognizing that there is no constitutional right to a trial by jury in condemnation cases. *Bauman v. Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270.

The Petitioner Did Not Establish Before the Court of Appeals That Its Right to the Extraordinary Writ of Mandamus Is Clear and Indisputable.

It is respectfully submitted that since these cases arise out of an application for writ of mandamus by the United States, the burden is upon the petitioner to establish that the references to commissioners were an abuse of discretion, and not upon the respondent or the landowners to again establish that the references were valid. That burden upon the petitioner is a heavy one. Thus, this Court has stated in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 384

> "We note additionally that the petitioner has not met the burden of showing that its right to issuance of the writ is 'clear and indisputable' (citations omitted)."

In its application for writ of mandamus before the Court of Appeals and in its petition for certiorari, the petitioner has made no showing whatsoever that the reference of any one of the cases here involved was improper. What the petitioner has attempted to do is to establish that Judge Hall has referred four separate groups of cases to commissioners pursuant to Rule 71A(h) and to reason from that fact that the Judge has made a "blanket reference".

It is respectfully submitted that, without a showing that the references in individual cases were improper, the petitioner has established nothing more than a coincidence of reference of four groups of cases at about the same time. Since it is highly probable that each of the four groups of cases was a proper group of cases for a reference, and since the petitioner has not negatived nor detracted from that probability in the slightest, it is submitted that petitioner has by no means carried the heavy burden placed upon it.

The Trial Judge Properly Exercised the Discretion Granted to Him by Rule 71A(h) in Referring the Pertinent Cases to Commissioners.

In making the references to commissioners in the Casitas Dam and Reservoir cases, the Lemoore Naval Air Station cases, the Success Dam cases, and the Terminus Dam cases, the trial judge exercised a discretion specifically granted him by the Rule and specifically considered the factors expressed by the Rule to govern the exercise of that discretion. Those factors as stated in the Rule are "character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice".

Character of the Land.

The trial judge considered the character of the property involved.[11] Although he did not phrase his orders with the word "character", the orders did consider the nature of the property and its varied terrain and uses (pp. 1, 8, 17, 27), and the type and kind of the nature of rights or

[11]Contrary to the statement on page 18 of the petition, the finding of the character of land in the Casitas, Terminus and Success cases was the same in all those cases.

interests in the property claiming just compensation (pp. 1, 8, 17, 27). Character of land similar to that involved in the instant matters has been held to be a factor justifying a reference to commissioners. *United States v. Waymire*, 202 F. 2d 550, and *United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492.

The petition for certiorari recognizes that the trial judge did consider the factor of character of the land in exercising his discretion. The petition argues, however, that because land of the same character may be involved in other cases, the factor as here present does not justify a reference. It is submitted that such is neither the wording nor the intent of Rule 71A(h). The Rule was adopted by reason of a satisfactory experience with the use of commissioners in the Tennessee Valley Authority land acquistions (Report of Advisory Committee, 7 Moore's Fed. Practice, 2d Ed., p. 2741). In the Tennessee Valley Authority cases, unique lands were not involved and to the contrary, the condemnations were oftentimes of lands of similar character to other lands within the project. It is respectfully submitted that when the Rule states that the trial judge is to consider the character of the land, that statement requires merely that the trial judge determine that in his judgment, by reason of the nature of the property involved a commission will be more likely to give a just result than will a jury. Nowhere does Rule 71A(h) give either party to the litigation the right to substitute its judgment for that of the court.

Location of the Property.

The court also considered the location of the property involved in exercising its discretion to refer the cases to commissioners pursuant to Rule 71A(h). The distances

of the property involved from the place of trial are stated, *infra*, at page 3 of this brief. Cases which have considered comparable distances significant and justifying a reference to a commission are *United States v.* 1,584.11 *Acres of Land, etc.*, 141 Fed. Supp. 720, 721 (E. D. S. C. 1956) (69 miles); *United States v.* 5,677.94 *Acres of Land, etc.*, 25 Fed. Rules Serv. 71A-h.3, Case 3 (D. Mont. 1958) (100 miles); *United States v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492, 495 (8th Cir. 1955) (125 miles).

Quantity of Property.

The trial court also considered the quantity of the property to be condemned in making its references. The quantities of land involved in each of the groups of cases are stated, *infra*, at page 5 of this brief. In many cases, also, the determination of just compensation will require the valuation of larger properties of which the property condemned is a part (pp. 86, 93, 99, 126). Cases which have considered similar amounts of land significant in determining the propriety of a reference to a commission are: *United States v. 2,792.82 Acres of Land, etc.*, 114 Fed. Supp. 76 (E. D. S. C. 1953) (851 acres taken out of a parcel of 4,000 acres); *United States v. Cunningham*, 246 F. 2d 330 (4th Cir. 1957) (1858 acres); *United States v. 5,677.94 Acres of Land, etc.*, 25 Fed. Rules Serv. 71A-h.3, Case 3 (D. Mont. 1958) (5,677.94 acres).

In arguing against the validity of the quantity factor as applied by Judge Hall in these cases, the petition for certiorari again argues that a similar quantity of land will be present in many Bureau of Reclamation type condemnations. It is respectfully submitted that this argument is not an argument against the propriety of the references here made by Judge Hall but rather an argu-

ment against Rule 71A(h). Thus, the Advisory Committee in its report to the Supreme Court dated March 1951, states in part:

> "Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference. . . . These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydro-electric power, reclamation, National forests, and others." (7 Moore's Fed. Practice, 2d Ed., p. 2741).

By any standard, the amounts of property taken here are large and if similarly large quantities of land will be taken in other totally separate flood control and reclamation projects, that fact in no way detracts from the validity of the reference here by reason of the quantity of the properties.

Other Reasons in the Interest of Justice.

In making the references, Judge Hall also considered other reasons in the interest of justice. Those other reasons were complexity of the issues involved and the probability that appointment of commissioners in each of the groups of related cases will result in more uniformity in award for like property involved in the particular group of cases than could be expected if each separate case were tried by a jury. Related to this latter statement is the finding by the trial court that it would be impractical if not impossible to try the issue of just compensation of the various properties involved in each group of related cases before one jury.

Complexity of the issue of valuation has been held to be a reason justifying a reference to commissioners in *United States v. Buhler*, 254 F. 2d 876; *United States v. Cunningham*, 246 F. 2d 330; *United States v. Waymire*, 202 F. 2d 550. Nor is *LaBuy v. Howes Leather Co.*, 352 U. S. 249, a holding to the contrary. *LaBuy* involves not a reference pursuant to Rule 71A(h) but a reference to a master under Rule 53 of an issue which, if not referred to the master, would have been tried by the court without a jury. If the choice of a forum is between the judge himself and a master, it is clear that the judge should be better able to determine a complex issue than should the master. That is what the Supreme Court found in *LaBuy*. In the case of a Rule 71A(h) reference, however, the choice of forum is between a commission of three persons chosen for their ability, and a jury of twelve chosen by lot. If we accept the basic rationale of *LaBuy* that the more complex the issue, the more skilled should be the forum which should hear it, the result is inescapable that complexity should in itself justify a Rule 71A(h) reference.

Nor is complexity of issue the only factor which was considered by the trial judge as a reason for reference to commissioners in the interest of justice. The order recites that the references of each related group of cases were made in the interest of seeking uniformity of award for like properties. This desire for uniformity was expressed as a reason for the use of a commission by the Advisory Committee in recommending Rule 71A(h) (7 Moore's Federal Practice, 2d Ed., p. 2741).

The Order of Judge Hall Referring the Casitas Dam and Reservoir Cases to Commissioners Is Not Excessive in Scope.

The Petition for Certiorari argues that Judge Hall's orders referring the cases here involved to commissioners refer more than the issue of just compensation to those commissioners and thus are a reference of matters not encompassed within Rule 71A(h). While such an argument conceivably might have applied to the orders originally entered by the Court, those orders were amended significantly prior to the commencement of hearings by the commissioners (p. 140).

It is submitted that it is the amended orders under which the commissioners are operating and not the original orders. While the original orders purportedly empowered the commissioners to file a report setting forth their conclusions as to the person or persons or entity entitled to receive the award, the amended orders merely direct the commissioners to report to the judge the person or persons or entity *claiming* to be entitled to receive such award. It is respectfully submitted that a direction to the commissioners to report to the Judge those persons who have presented contentions before them is by no means a direction to exercise a power not granted by the Rule.

The petition also contends (see footnote 9 on page 18) that the orders of reference are excessive in scope in that they direct the commissioners to make a separate award of just compensation and values with respect to each separate parcel, interest, ownership, or claim involved. Again, it is respectfully submitted that nothing in these orders goes beyond the scope of the reference permitted in Rule 71A(h). It would appear that the commissioners in arriving at the total value of the real property in-

volved can very well consider the valuation of the parts making up the whole, and can report to the judge their conclusions in regard to the valuations assigned to those parts of the whole. As a matter of fact, the petitioner, in its Petition in a companion case in which it seeks certiorari in *United States v. Cunningham*, contends, at pages 15 and 16, that commissioners are required to go much beyond this and actually to find separate values for each category of land included within the condemnation action.

Assuming *arguendo* that the orders of Judge Hall may be interpreted to refer the matter of apportionment of award to commissioners (which is, it is submitted, by no means the normal interpretation of the amended orders), it is respectfully submitted that the petitioner should not be allowed to complain of such an order by way of petition for the extraordinary writ of mandamus. In the first instance, the petitioner will have its remedy by appeal from the judgment at which time there will have been established whether or not there is any question of apportionment of award in any particular case. See *Roche v. Evaporated Milk Association*, 319 U. S. 21. Secondly, it appears that in no event will petitioner have any interest in how a particular award is apportioned. *United States v. Dunnington*, 146 U. S. 338; *United States v. Adamant Co.*, 197 F. 2d 4 (C. A. 9); *Burkhart v. United States*, 227 F. 2d 659 (C. A. 9); *United States v. Certain Lands*, 129 F. 2d 918 (C. A. 2). If petitioner has no interest in apportionment of a condemnation award, its status to overturn by mandamus a reference to commissioners on the basis that they have excessive powers in regard to the matter in which the petitioner has no interest is at best so highly doubtful as to justify denying the writ.

Conclusion.

It is respectfully submitted that the petition for certiorari filed herein presents no issue of significant importance in judicial administration, that the questions raised in the petition have been decided uniformly by Courts of Appeal for seven Circuits, and that the trial court properly exercised a discretion expressly granted to it by Rule 71A(h) in referring certain groups of cases to commissions, and the Court of Appeals likewise properly exercised its discretion in denying a writ of mandamus which would have compelled the trial judge to vacate his orders of reference. For those reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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ROBERT M. JONES,

Counsel for amicus curiae Dorothy R. Battin.

APPENDIX.

In the Supreme Court of the United States, October Term, 1959.

No. .....

United States of America, Petitioner vs. Honorable Peirson M. Hall, Chief Judge, United States District Court for the Southern District of California, Respondent.

Affidavit Supplementing Brief of Amicus Curiae in Opposition to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

State of California, County of Los Angeles—ss.

Philip H. Angell, being first duly sworn, deposes and says:

That affiant is one of the attorneys of record for the following persons, who are owners of land subject to condemnation proceedings pending in the United States District Court, Southern District of California, Central Division:

John H. Dunshee, Frank G. Dunshee, Edward L. Lau and Margaret C. K. Lau, defendants in Action No. 20577-PH;

John H. Dunshee and Frank G. Dunshee, defendants in Actions 678-57-PH and 877-57-PH;

Charlotte F. Dunshee and Harvey Scott Dunshee, as guardian of the estate of Charlotte F. Dunshee, an incompetent person, defendants in Action 877-57-PH;

Jack M. Eakins and Adele L. Eakins, defendants in Action 678-57-PH; and

Dorothy D. Battin, defendant in Action 877-57-PH.

Affiant has been the principal trial attorney in charge of the preparation and actual trial of the aforesaid three actions and is thoroughly familiar with all aspects thereof.

Said three actions are among the group of unconsolidated condemnation cases involved in the Casitas Dam Project. A statement of the character, location and quantity of the property to be condemned and of the complexity of the issues involved in the valuation thereof for the parcels owned by defendants represented by affiant is contained in the appendices to the petition for writ of mandamus filed by the United States in the Court of Appeals at pages 117 through 139.

The complaint and declaration of taking on behalf of the United States in Action No. 20577-PH was filed October 10, 1956; in Action No. 678-57-PH on June 3, 1957; and in Action No. 877-57-PH on July 18, 1957. By order of said District Court, dated May 20, 1959, said three actions, together with six other actions involving property in the Casitas Dam Project, were referred to three commissioners for determination of the issue of just compensation pursuant to Rule 71A(h) F. R. C. P. The Commissioner on July 15, 1959 originally scheduled the nine cases for successive trials commencing September 1, 1959, without objection and with the consent of the United States. The United States on August 25, 1959 moved the District Court to set aside its order of reference; trial of the cases originally set for September 1, 1959 and October 1, 1959 was deferred pending ruling on the motion. On October 1, 1959, the District Court denied the motion, at which time the United States announced its intention of filing a petition for writ of mandamus. Such petition was not filed in the ensuing two months. The commissioners thereupon reset the

Casitas Dam cases without objection and with the consent of the United States. The three cases in which affiant's clients are defendants were set for trial commencing December 14, 1959. On December 12, 1959 the United States filed with the Court of Appeals its motion for leave to file petition for writ of mandamus and also sought from the Court of Appeals an order staying proceedings before the commissioners. The Court of Appeals on December 14, 1959 denied the stay, granted leave to file a petition and issued an order to show cause returnable January 5, 1960. Following a hearing on that date, the Court of Appeals on January 9, 1960 issued its opinion denying the writ. The United States on April 11, 1960 filed its petition for writ of certiorari herein.

Trial before the commissioners commenced December 14, 1959, with the consent of the United States, and has continued without substantial interruption since that date to and including the date of this affidavit. Defendants represented by affiant have rested their case and counsel for the United States has stated to the commissioners that its case will be completed in three weeks. In excess of 200 exhibits, many of which are multiple in character, have been introduced. Much of the engineering and other technical data relating to the matter of valuation which has been presented in the nearly five months of trial is common not only to the three cases of defendants represented by affiant but also to the other Casitas Dam Project cases now pending before the commissioners. The availability of such background data, common to all the cases will immeasurably shorten the trial time and simplify the presentation of the remaining Casitas cases.

The trial before the commissioners has justified the District Court's determination that the ends of Justice

required the reference. The trial itself has demonstrated beyond question that the issues could not have been effectively presented to nor intelligibly considered by a jury. The complexity of the valuation problems necessarily involved are illustrated by the volume of evidence relating to water rights, engineering studies, land uses and classifications and the fact that one of the expert appraisers presented by defendants had studied the properties involved and related comparables for more than a year prior to trial and was under cross-examination by the United States for approximately six weeks of trial.

Affiant's clients have expended in excess of $100,000.00 in the preparation and trial of these cases to date, exclusive of attorneys' fees. Any termination of the present proceedings before the commissioners prior to the completion of the present trial and the approval of the commissioners' determination would cause grave and irreparable injury to these defendants. Any review of the propriety of the District Court's order of reference to commissioners by the Court of Appeals or by the United States Supreme Court should be had in the normal course of appellate review when the entire record of the evidence necessarily relevant to a proper determination of the issue of just compensation will be available to the reviewing court. Any such review accomplished through the extraordinary writ procedure prior to the completion of actual trial would necessarily present only a partial picture of the nature and character of the property condemned and of the complexity of the issues involved in determining the issue of just compensation.

The petition for certiorari and brief in support thereof indicates that the United States is in reality seeking to evade the operation of Rule 71A(h) with no regard for

the great injustice which would thereby result to the landowner defendants, who are the real parties in interest, in each and all of the Casitas Dam cases. This is also illustrated by the delays of the United States in seeking Appellate and United States Supreme Court extraordinary review of the order of reference. The same design is disclosed by testimony by the Honorable S. A. Andretta, Administrative Assistant Attorney General, and by the Honorable Perry W. Morton, Assistant Attorney General, Lands Division, before the Rooney Sub-Committee of the Appropriations Committee of the House of Representatives when that Sub-Committee was considering H.R. 11666 (Hearings before the Committee on Appropriations of the United States House of Representatives 86th Congress, pp. 158 et seq.).

Mr. Morton testified before that Sub-Committee concerning the subject of Rule 71A(h) references as follows:

> "We have fought this business all the way through to the point where we are just abount out of gas in our efforts to do anything about it within the framework of the cases, and I frankly do not know any other answers.
>
> "It is a highly expense procedure. It costs the Government more in many ways and it costs the landowners more in many ways.
>
> "It is said, but the statement is completely unsupportable, that trial by commissioners results in a more expeditious disposal of cases. I could demonstrate for the next 2 days that this is simply not so. It handicaps everyone in terms of any right of appeal because the rule is different on appeal in jury cases from what it is on appeal from a judgment entered upon a commission's award.

"I think the view of some of the judges, though I think they are misleading themselves, is that they are saving themselves time, and indeed in some of these districts the condemnation caseload is a little bit overwhelming. But I think the thing they fail to recognize is that if they properly perform their judicial function they have to go over these transcripts anyway, if the award is contested on either side, before they can enter a judgment with proper judicial foundation.

"The trouble here is, of course, that as long as a case is tried before a lay commission, even if a lawyer is the chairman of it, there simply are no rules of evidence as a practical matter. They put in everything, including the kitchen sink, making transcripts that are two and three times as long as they would be if a judge set in control of the case with any rules of evidence imposed at the time the testimony is coming in."

H.R. 11666 was then reported by the Committee to the House of Representatives. The report of the Sub-Committee quoted Mr. Morton's statement that, "It is a highly expensive procedure. It costs the governn nt more in many ways and the landowners more in mar ways", and accordingly recommended the adoption Section 207 of H.R. 11666 which provides:

"Section 207. None of the fur s appropriated by this title may be used for the co pensation of commissioners appointed in lands cases under Rule 71A(h) of the Federal Rules of Civil Procedure."

Any change in the scope and pplicability of Rule 71A(h) F.R.C.P. should be accomplished in the normal

manner contemplated by the rules; such change should not be effected by resort to the extraordinary writ procedure in cases presently pending and in the course of trial before the commissioners. Certainly any such retroactive application of a change in rules would be most prejudicial to defendant landowners.

Further affiant saith not.

Philip H. Angell
PHILIP H. ANGELL

Subscribed and sworn to before me this 5th day of May, 1960.

DOROTHY IRENE POPE
Notary Public in and for the County of Los Angeles, State of California.